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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 291

FLORENCE H. McSWEENEY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EUGENE B. McSWEENEY, DECEASED,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

DOUGLAS McKAY,
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GEORGE WARREN,
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THOS. M. BOULWARE,
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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Florence H. McSweeney, respectfully represents that she is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, in the suit in equity, entitled No. 4910, Florence H. McSweeney, individually and as administratrix of the estate of Eugene B. McSweeney, appellant, *versus* The Prudential Insurance Company of America, respondent, decided June 4, 1942, and by reason thereof your petitioner prays for the allowance of a writ of certiorari

to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

I.

Summary Statement of Matter Involved.

This is a suit in equity, commenced in the District Court of the United States for the Eastern District of South Carolina, by respondent, The Prudential Insurance Company of America, against Eugene B. McSweeney, now deceased, and petitioner, Florence H. McSweeney, in which Respondent seeks to have rescinded and cancelled a life insurance policy in the sum of five thousand dollars issued by it on the life of the said Eugene B. McSweeney, with the said Florence H. McSweeney named as beneficiary. Before trial the insured died and, by consent, the beneficiary filed a supplemental answer, as beneficiary and as administratrix of said estate, alleging the insured's death and setting up a cross action for the recovery of the amount of the policy.

The Bill of Complaint contains the usual allegations of an action for recision and cancellation, and the basis upon which the relief is sought as upheld by the Master, is the charge that the insured in his application for the policy had fraudulently made certain material misrepresentations which entitled the insurance company to cancellation, to-wit: in answering question 7-A as to albumin, blood or sugar in urine and abnormal high blood pressure; 9-A as to being attended by a physician during the past three years, giving dates, complaints, doctors' names and addresses; and 10-B as to completeness of answers to questions 6, 7, 8 and 10-A.

The issues of law and fact were referred to a special master, Hon. E. W. Mullins of the Columbia, S. C., bar,

to hear the evidence and make and report his findings of fact and conclusions of law, who reported as a conclusion of fact, pertinent here:

> "5. I conclude that the evidence is insufficient to show that the insured at the time of making the representations in question had a conscious design or intent to defraud the insurance company."

and as a pertinent conclusion of law, that:

> "3. Representations of material facts within the insured's personal knowledge such as those here involved, relied upon by the insurance company, and which were untrue and known by the insured to be untrue when made, invalidate the policy even in the absence of proof of a conscious design or intent on the part of the insured to defraud the insurance company."

The discussion of the Master on which the foregoing findings are primarily based is given in footnote.[1]

By a formal order, the Judge Designate in the District Court, the Honorable A. W. Barksdale of Lynchburg, Vir-

[1] "As I have already stated, the evidence in this case falls far short of convincing me that the insured had an actual conscious intent to defraud the insurance company. On the question of intent it is impossible to say what was in Mr. McSweeney's mind when he stated that he had not consulted a physician other than Dr. Boyd, or had never had high blood pressure. Bearing in mind the evidence of the good character of the insured, which, under the South Carolina decisions, is an element to be considered, and the further fact that the insured, when he answered the questions, may have honestly thought that he had recovered from the conditions about which he had been previously advised by Dr. Levy, it is not unreasonable to assume that he had no conscious design or intent to defraud the insurance company. If, under the law of South Carolina, it is necessary for complainant to establish an actual design or scheme to defraud then the relief by way of cancellation should be denied. The question is not free from doubt and in fact has given me a great deal of concern by reason of certain general statements in some of the South Carolina decisions, to which I will later refer. Nevertheless I have reached the conclusion that under the law of South Carolina material representations, such as those here involved, relied on by the insurance company, which were untrue when made, invalidate the policy even in the absence of proof of a conscious scheme or design on the part of the insured to defraud the insurance company."

ginia, approved the master's findings of fact and conclusions of law, and adopted the same as those of the District Court. Upon appeal by Petitioner, McSweeney, to the Circuit Court of Appeals for the Fourth Circuit, that court, for the reasons stated in its opinion, entered June 4, affirmed the Decree appealed from. By order of July 2, 1942, mandate was stayed for thirty days, and by order of July 30 for twenty days. The reasons given in said opinion, briefly stated, in accordance with our understanding thereof, are that conscious *intent* on the part of insured *to deceive* need not have existed, that the requisite intent to deceive may be inferred from insured's signature to the application containing the untrue answers, and that the Circuit Court of Appeals has "full power" to review the findings of fact the pertinent portions of the decision being as quoted in footnote.[2]

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[2] "We think it clear that fraud of the sort required to avoid the policy is shown to exist where there is a false representation as to a material matter, which is false to the knowledge of the applicant at the time it is made and which is made for the purpose of being acted on by the company. Where these facts appear, *it is idle to inquire further whether there was an intent to defraud; for the intent to defraud in such case is the intent to obtain the policy by the false representations. Any question as to whether the insured may honestly have thought that he had recovered from the serious ailment from which he knew that he had suffered and for which he had consulted a physician is beside the point.*"

"While the cases relied on are authority for the position that a fraudulent intent in addition to the false representations there shown is necessary to establish fraud, *they are not authority for the position that fraudulent intent is not to be inferred from the making of the false representations* which are false within the knowledge of the person making them and are material and made to be acted on; and they do not militate against the holding of the Johnson case to the effect that fraudulent intent must be inferred from such representations when no other conclusion can reasonably be drawn from them. In the second place, the case was one heard in equity and not at law; and this court has *full power* to review the findings of fact. We entertain no doubt upon the evidence appearing in the record that the making of the false answers in the application as to matters inquired about, which were false to the knowledge of the applicant when making them, established fraud vitiating the policy *within the holding of the Johnson case.*

II.

Basis of Jurisdiction of Supreme Court.

Jurisdiction rests upon section 240-a of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936, conferring jurisdiction to review any judgment of the Circuit Court of Appeals; and section 5-b of Rule 38 of the Supreme Court; together with diversity of citizenship and the jurisdictional amount.

III.

Questions Presented.

1. Is the decision herein in conflict with the law of South Carolina, as expounded by its highest court, in a number of cases, that in actions of this character the insurer must prove as a matter of fact, by clear and convincing *evidence, in addition to the mere signing of the application* containing the false answers, *that the insured had an actual or conscious intent or design to deceive and defraud the insurance company* in making the answers complained of.

2. Is the decision herein in conflict with the decisions of other Circuit Courts of Appeal as to the measure of proof required to make such a concurrent finding of fact "clearly erroneous" within the meaning of Rule 52-a of the Rules of Civil Procedure, if this Court should construe the decision herein (contrary to our construction thereof) as reversing the concurrent finding of fact by the Master and District Judge, based on inferences from oral testimony in conflict with deductions from other evidence, that the insured herein had no conscious intent to deceive and

defraud the insurance company, some of such decisions rendered in 1942 being cited in footnote.[3]

IV.

Reasons Relied Upon for Allowance of the Writ.

1. That the Circuit Court of Appeals has decided herein an important question of South Carolina law in a way probably in conflict with applicable decisions of the Supreme Court of South Carolina and this decision will control the many suits involving this question that may be brought in or removed to the Federal Courts in South Carolina in future years. It is a matter of public knowledge that many of the South Carolina policies are issued by insurance companies incorporated under the laws of other States and that many suits based on such policies, involving more than $3,000.00 and arising within the contestable period, are either commenced in the Federal Courts of South Carolina by such foreign insurance companies or removed to the Federal Courts when commenced in the State Courts by the insured. The court records will show that there are relatively a large number of these cases, and petitioner respectfully submits that this decision will bring about the very situation supposedly remedied by this Honorable Court in *Erie R. R.* v. *Tompkins,* 304 U. S. 64, and as to which this Court said, in *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 85 L. Ed 109: "The question has practical aspects of great importance in the proper administration of justice in the Federal Courts."

2. Petitioner further respectfully submits that, for the benefit of both the Bench and the Bar, the confusion ap-

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[3] 9th Cir. (1942) *Smith* v. *Royal Ins. Co.,* 125 F. 2nd 222; 3rd Cir. (1942) *Floridin Co.* v. *Clay,* 125 F. 2nd 669; 5th Cir. (1942) *Texas Agri. Assn.* v. *Hidalgo,* 125 F. 2nd 829; 8th Cir. (1942) *Adair* v. *Reorganization Inv. Co.,* 125 F. 2nd 901; 1st Cir. (1942) *U. S.* v. *State St. Trust Co.,* 124 F. 2nd 948.

parent in the application of Rule of Civil Procedure No. 52(a) by the several Circuit Courts should be cleared up by a definite construction and application of that rule by this Honorable Court.

Respectfully submitted,

FLORENCE H. McSWEENEY,
Petitioner.

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